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CENTRAL FAX CENTER****In the United States Patent and Trademark Office SEP 17 2008**

Applicants:	Paul T. Van Gompel et al.	Docket No.:	19,288
Serial No.:	10/749,366	T.C./A.U.:	3761
Confirmation No.:	1191	Examiner:	Kidwell, Michele M
Filed:	December 31, 2003	Date:	September 17, 2008
For:	DISPOSABLE GARMENT HAVING AN ELASTIC INNER LAYER WITH A NARROW WIDTH IN THE CROTCH REGION		

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

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BRIEF ON APPEAL (15 pages)

16 total pages, including this page

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Judith M. Anderson

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Brief on Appeal to the Board of Patent Appeals and Interferences

Mail Stop Appeal Brief - Patents
Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to 37 C.F.R. 41.37 Appellants respectfully submit this Brief in support of their Appeal of Examiner Kidwell's **Final Rejection** of claims 1-2, 4, 7, 10-11, 15-16, 18, 20-21, 23, 28-29, 33-34, 37-38, 40, 43, 46-47, 51-52 and 55 which was mailed on April 17, 2008.

On July 17, 2008, Appellants, pursuant to 37 C.F.R. 41.31 mailed a timely Notice of Appeal which was received in the USPTO on July 17, 2008. Thus, the time period for filing this Brief ends on September 17, 2008.

Real Party in Interest

The present Application has been assigned to the Kimberly-Clark Worldwide, Inc. which is the real party in interest.

Related Appeals and Interferences

US patent application 10/750,402 is directed to related subject matter and is currently on appeal and may directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

To the knowledge of Appellants, Appellants' legal representative, or assignee, there are no other known related appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

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Status of Claims

Claims 1-2, 4, 7, 10-11, 15-16, 18, 20-21, 23, 28-29, 33-34, 37-38, 40, 43, 46-47, 51-52 and 55 remain in the application with claims 1-2, 4, 7, 10-11, 15-16, 18, 20-21, 23, 28-29, 33-34, 37-38, 40, 43, 46-47, 51-52 and 55 being finally rejected. Claims 3, 5-6, 8-9, 12-14, 17, 19, 22, 24-27, 30-32, 35-36, 39, 41-42, 44-45, 48-50, and 53-54 were previously cancelled. The appealed claims include 1-2, 4, 7, 10-11, 15-16, 18, 20-21, 23, 28-29, 33-34, 37-38, 40, 43, 46-47, 51-52 and 55 and appear in the CLAIMS APPENDIX of this Brief.

Status of Amendments

No amendments were filed subsequent to the Final Rejection.

Summary of Claimed Subject Matter

The following summary correlates claim elements to specific embodiments described in the application specification, but does not in any manner limit claim interpretation. Rather, the following summary is provided only to facilitate the Board's understanding of the subject matter of this appeal.

The invention of independent claim 1 provides a disposable garment (100) with a garment length (120), an outer layer (80) and an elastic inner layer (20). (See e.g., Figs. 1 and 2 and page 9, lines 22-24). The elastic inner layer (20) defines an opening (90) located in an internal position to the elastic inner layer perimeter (25). The opening (90) is a slit or aperture through a bodyfacing surface (23) of the elastic inner layer (20). The opening (90) has a length (95) that is 10% to 90% of the garment length (120). (See e.g., page 11, lines 34-36 and page 12, lines 1-6). The elastic inner layer perimeter (25) is bonded to the outer layer (80). (See e.g., page 15, lines 35-36 and page 16, line 1). The outer layer (80) and the elastic inner layer (20) form a front waist region (30), a back waist region (40), and a crotch region (50). The crotch region (50) connects the front waist region (30) and the back waist region (40). (See e.g., page 9, lines 23-26). The elastic inner layer (20) has a width at a narrowest portion of the crotch region (50) of equal to or less than 4 inches. (See e.g., page 21, lines 10-14).

Independent claim 20 provides a disposable garment (100) with a garment length (120). The disposable garment (100) has a stretchable outer layer (80) and an elastic inner layer (20). (See e.g., Figs. 1 and 2 and page 9, lines 22-24). The elastic inner layer (20) defines an opening (90) located in an internal position to the elastic inner layer perimeter (25). The opening (90) is a slit or aperture through a bodyfacing surface (23) of the elastic inner layer (20). The opening (90) has a length (95) that is 10% to 90% of the garment length (120). (See e.g., page 11, lines 34-36 and page 12, lines 1-6). The elastic inner layer perimeter (25) is bonded to the stretchable outer layer (80). (See e.g., page 15,

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lines 35-36 and page 16 line 1). The elastic inner layer (20) has an elastic inner layer retraction value. The stretchable outer layer (80) has a stretchable outer layer retraction value that is less than the elastic inner layer retraction value. (See e.g. page 16, lines 11-19). The stretchable outer layer (80) and the elastic inner layer (20) form a front waist region (30), a back waist region (40), and a crotch region (50). The crotch region (50) connects the front waist region (30) and the back waist region (40). (See e.g., page 9, lines 23-26). The elastic inner layer (20) has a width at a narrowest portion of the crotch region (50) of equal to or less than 4 inches. (See e.g., page 21, lines 10-14).

Independent claim 37 provides a disposable absorbent article (100) with a garment length (120). The disposable absorbent garment (100) has an outer layer (80) and an elastic inner layer (20). (See e.g., Figs. 1 and 2 and page 9, lines 22-24). The elastic inner layer (20) has an elastic inner layer perimeter (25). The elastic inner layer (20) defines an opening (90) located in an internal position to the elastic inner layer perimeter (25). The opening (90) is a slit or aperture through a bodyfacing surface (23) of the elastic inner layer (20). The opening (90) has a length (95) that is 10% to 90% of the garment length (120). (See e.g., page 11, lines 34-36, and page 12, lines 1-6). The elastic inner layer perimeter (25) is bonded to the outer layer (80). (See e.g., page 15, lines 35-36 and page 16, line 1). The outer layer (80) and the elastic inner layer (20) form a front waist region (30), a back waist region (40) and a crotch region (50). The crotch region (50) connects the front waist region (30) and the back waist region (40). (See e.g., page 9, lines 23-26). The elastic inner layer (20) has a width at a narrowest portion of the crotch region (50) of equal to or less than 4 inches. (See e.g., page 21, lines 10-14). An absorbent assembly (150) is positioned between the outer layer (80) and the elastic inner layer (20). The absorbent assembly (150) includes a topsheet layer, a core layer and a barrier layer. (See e.g., page 18, lines 2-10).

Dependent claims 11, 29, and 47 depend from independent claims 1, 20, and 37 respectively and further require that the elastic inner layer (20) be liquid impermeable. (See e.g., page 11, lines 19-22).

Dependent claims 15, 16, 33, 34, 51, 52 depend from independent claims 1, 20, and 37 and further require that either the outer layer width be greater than the elastic inner layer width or the outer layer length be greater than the elastic inner layer length. (See e.g., page 13, lines 1-13).

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Grounds of Rejection to be Reviewed on Appeal

Ground 1

Claims 1-2, 4, 7, 10-11, 15-16, 18, 20-21, 23, 28-29, 33-34, 37-38, 40, 43, 46-47, 51-52 and 55 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,681,302 to Melbye et al. (hereinafter "Melbye") in view of U.S. Patent No. 5,462,537 to Carr et al. (hereinafter "Carr").

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Argument

Each ground of rejection is based on §103 as being obvious. The Examiner has the burden of establishing a *prima facie* case of obviousness. In order to establish a *prima facie* case of obviousness, three basic criteria must be met: (1) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings; (2) there must be a reasonable expectation of success; and (3) the prior art reference (or references when combined) must teach or suggest all the claim limitations. MPEP §2143. The application of the "teaching, suggestion, or motivation" (TSM) test is not "rigid." However, "there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness" *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d 1385, 1396 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006)) (emphasis added).

Ground 1 -- Rejection Of Claims 1-2, 4, 7, 10-11, 15-16, 18, 20-21, 23, 28-29, 33-34, 37-38, 40, 43, 46-47, 51-52 and 55

Claims 1-2, 4, 7, 10-11, 15-16, 18, 20-21, 23, 28-29, 33-34, 37-38, 40, 43, 46-47, 51-52 and 55 stand rejected under 35 U.S.C. § 103(a) as being unpatenable over Melbye in view of Carr.

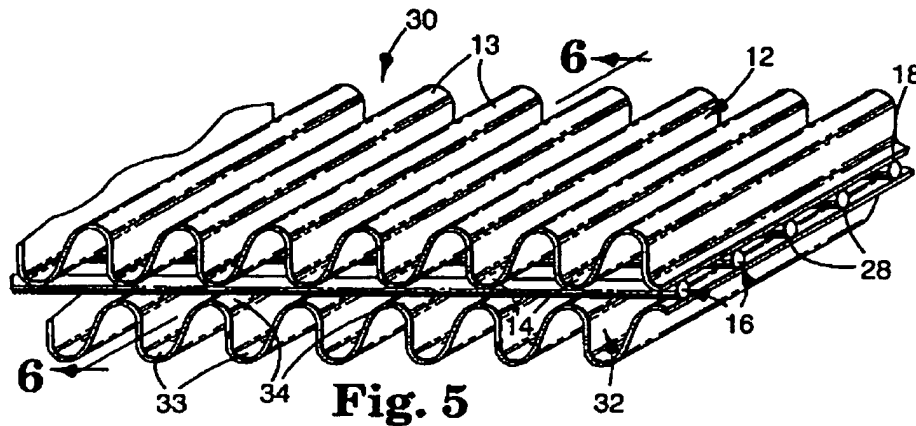
Claims 1, 20, 37

No *prima facie* case of obviousness has been established because Melbye and Carr, alone or in combination, do not teach or suggest all the claim limitations. Specifically, Melbye and Carr fail to teach or suggest a disposable garment having "an elastic inner layer wherein the elastic inner layer defines an opening located in an internal position to the elastic inner layer perimeter and wherein the opening is a slit or aperture through a bodyfacing surface of the elastic inner layer and wherein the opening has a length that is 10% to 90% of the garment length" as required by Appellants' claims 1, 20, and 37.

Melbye teaches an elastic sheet-like composite 30 having a multiplicity of generally parallel elongated strands 16 of resiliently elastic thermoplastic material thermally bonded to a first

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sheet 12 and a second sheet 32 as illustrated in Figure 5 (reproduced below) and described at column 10: lines 3-60.



Melbye states that either or both of the first and second sheets of flexible material may be needle punched. (col. 4, lines 20-27). As best understood by Appellants, the Examiner appears to be equating one or more of the needle punches as the claimed "slit or aperture" through the bodyfacing surface of the elastic inner layer. Even assuming, arguendo, that said reasoning is sound, the needle punches are not an opening having a length that is 10% to 90% of the garment length.

The Examiner disagrees and states at page 2 of the Office Action that

"a garment length" is not necessarily reflective of the entire length of the garment, and as such, any length thereof may be considered in conjunction with the disclosed openings in order to meet the claimed limitations.

Appellants respectfully disagree. MPEP 2111 states that the pending claims must be given their broadest reasonable interpretation consistent with the specification as it would be interpreted by one of ordinary skill in the art. It is clear from the specification that the "garment length" is the full length of the product as depicted in Fig. 1 (reproduced below) and identified as element 120.

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unable to find any teaching in the abstract or figures of Melbye to suggest that the elastic inner layer is liquid impermeable. The Examiner appears to be implying that all elastic material is liquid impermeable. (See e.g., Office Action at page 4, second paragraph). This implication is unsupported. Furthermore, Appellants assert that elastic material may be liquid permeable or liquid impermeable as discussed at page 11, lines 14-22 of Appellants' specification. Thus, no prima facie case of obviousness has been established. Appellants respectfully request reversal of this rejection for this additional reason.

Claims 15, 16, 33, 34, 51, 52

Claims 15, 16, 33, 34, 51, 52 further require that either the outer layer width be greater than the elastic inner layer width or the outer layer length be greater than the elastic inner layer length. The Examiner contends "that any length or portion thereof may be considered in order to meet the claimed limitation." Appellants respectfully disagree with the sufficiency of this rejection. Specifically, Appellants' specification describes having an elastic inner layer that is smaller than the outer layer to provide a snug fit against the body of the wearer while also providing volume for containment. (See e.g., page 13, lines 1-28). Melbye does not teach or suggest inner and outer layers having different widths or lengths. Appellants respectfully request reversal of this rejection for this additional reason.

Conclusion

For the reasons stated above it is Appellants' position that the Examiner's rejection of claims has been shown to be untenable and should be **reversed** by the Board.

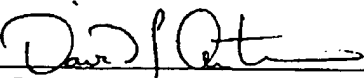
✓ Please charge the \$510.00 fee (fee code 1402), pursuant to 37 C.F.R. 41.20(b)(2), for filing this Appeal Brief to Kimberly-Clark Worldwide, Inc. deposit account number 11-0875. Any additional prosecutorial fees which are due may also be charged to deposit account number 11-0875.

The undersigned may be reached at: 920-721-3016

Respectfully submitted,

PAUL T. VAN GOMPEL ET AL.

By:



David J. Arteman

Registration No.: 44,512

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Appendix – The Claims On Appeal

The claims on appeal are:

1. A disposable garment having a garment length, the disposable garment comprising:
an outer layer;
an elastic inner layer, wherein the elastic inner layer has an elastic inner layer perimeter and wherein the elastic inner layer defines an opening located in an internal position to the elastic inner layer perimeter and wherein the opening is a slit or aperture through a bodyfacing surface of the elastic inner layer and wherein the opening has a length that is 10% to 90% of the garment length;
wherein the elastic inner layer perimeter is bonded to the outer layer; and
wherein the outer layer and the elastic inner layer form a front waist region, a back waist region and a crotch region, wherein the crotch region connects the front waist region and the back waist region and the elastic inner layer has a width at a narrowest portion of the crotch region of equal to or less than 4 inches.
2. The disposable garment of claim 1, wherein the outer layer has an outer layer perimeter and the elastic inner layer perimeter is bonded to the outer layer perimeter.
4. The disposable garment of claim 1, wherein the outer layer is elastic.
7. The disposable garment of claim 1, wherein the outer layer has one or more pleats.
10. The disposable garment of claim 1, wherein the elastic inner layer is elastic in both a longitudinal direction and a lateral direction of the disposable garment.
11. The disposable garment of claim 1, wherein the elastic inner layer is liquid impermeable.
15. The disposable garment of claim 1, wherein the disposable garment has a longitudinal direction wherein the outer layer has a length in the longitudinal direction, the elastic inner layer has a length in the longitudinal direction and the outer layer length is greater than the elastic inner layer length.

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16. The disposable garment of claim 1, wherein the disposable garment has a lateral direction wherein the outer layer has a width in the lateral direction, the elastic inner layer has a width in the lateral direction and the outer layer width is greater than the elastic inner layer width.
18. The disposable garment of claim 1, wherein the disposable garment has a longitudinal direction and wherein the narrowest portion of the crotch region is toward the front waist region from a longitudinal centerline.
20. A disposable garment having a garment length, the disposable garment comprising:
a stretchable outer layer;
an elastic inner layer, wherein the elastic inner layer has an elastic inner layer perimeter and wherein the elastic inner layer defines an opening located in an internal position to the elastic inner layer perimeter and wherein the opening is a slit or aperture through a bodyfacing surface of the elastic inner layer layer and wherein the opening has a length that is 10% to 90% of the garment length;
wherein the elastic inner layer perimeter is bonded to the stretchable outer layer; and
wherein the elastic inner layer has an elastic inner layer retraction value and the stretchable outer layer has a stretchable outer layer retraction value that is less than the elastic inner layer retraction value; and
wherein the stretchable outer layer and the elastic inner layer form a front waist region, a back waist region and a crotch region, wherein the crotch region connects the front waist region and the back waist region and the elastic inner layer has a width at a narrowest portion of the crotch region of equal to or less than 4 inches.
21. The disposable garment of claim 20, wherein the stretchable outer layer has a stretchable outer layer perimeter and the elastic inner layer perimeter is bonded to the stretchable outer layer perimeter.
23. The disposable garment of claim 20, wherein the stretchable outer layer is elastic.

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28. The disposable garment of claim 20, wherein the elastic inner layer is elastic in both a longitudinal direction and a lateral direction of the disposable garment.

29. The disposable garment of claim 20, wherein the elastic inner layer is liquid impermeable.

33. The disposable garment of claim 20, wherein the disposable garment has a longitudinal direction wherein the stretchable outer layer has a length in the longitudinal direction, the elastic inner layer has a length in the longitudinal direction and the stretchable outer layer length is greater than the elastic inner layer length.

34. The disposable garment of claim 20, wherein the disposable garment has a lateral direction wherein the stretchable outer layer has a width in the lateral direction, the elastic inner layer has a width in the lateral direction and the stretchable outer layer width is greater than the elastic inner layer width.

37. A disposable absorbent garment having a garment length, the disposable absorbent garment comprising:

an outer layer;

an elastic inner layer, wherein the elastic inner layer has an elastic inner layer perimeter and wherein the elastic inner layer defines an opening located in an internal position to the elastic inner layer perimeter and wherein the opening is a slit or aperture through a bodyfacing surface of the elastic inner layer layer and wherein the opening has a length that is 10% to 90% of the garment length;

wherein the elastic inner layer perimeter is bonded to the outer layer;

wherein the outer layer and the elastic inner layer form a front waist region, a back waist region and a crotch region, wherein the crotch region connects the front waist region and the back waist region and the elastic inner layer has a width at a narrowest portion of the crotch region of equal to or less than 4 inches; and

an absorbent assembly positioned between the outer layer and the elastic inner layer, wherein the absorbent assembly includes a topsheet layer, a core layer and a barrier layer.

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38. The disposable absorbent garment of claim 37, wherein the outer layer has an outer layer perimeter and the elastic inner layer perimeter is bonded to the outer layer perimeter.
40. The disposable absorbent garment of claim 37, wherein the outer layer is elastic.
43. The disposable absorbent garment of claim 37, wherein the outer layer has one or more pleats.
46. The disposable absorbent garment of claim 37, wherein the elastic inner layer is elastic in both a longitudinal direction and a lateral direction of the disposable absorbent garment.
47. The disposable absorbent garment of claim 37, wherein the elastic inner layer is liquid impermeable.
51. The disposable absorbent garment of claim 37, wherein the disposable absorbent garment has a longitudinal direction wherein the outer layer has a length in the longitudinal direction, the elastic inner layer has a length in the longitudinal direction and the outer layer length is greater than the elastic inner layer length.
52. The disposable absorbent garment of claim 37, wherein the disposable absorbent garment has a lateral direction wherein the outer layer has a width in the lateral direction, the elastic inner layer has a width in the lateral direction and the outer layer width is greater than the elastic inner layer width.
55. The disposable absorbent garment of claim 37, wherein the disposable absorbent garment has a longitudinal direction and a lateral direction and wherein the absorbent assembly is attached to the outer layer along a lateral centerline of the absorbent assembly.

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Evidence Appendix

Not Applicable

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Related Proceedings Appendix

There are no known related proceedings.